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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 621

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

No. 622

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD and THE TOWNSHIP OF TEANECK; and CITIZENS UNITED TRANSIT COMMITTEE,
Plaintiff-Intervenors-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM FINAL JUDGMENT AND DECREE

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MOTION TO AFFIRM FINAL JUDGMENT AND DECREE

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, The New York Central Railroad Company,

appellee, moves that the final judgment and decree below be affirmed on the ground that the questions presented by the above appeals are so unsubstantial as not to need further argument.

Statement of the Case

These are direct appeals, No. 621 by the State of New Jersey and its regulatory commission (the original plaintiffs) and No. 622 by a number of communities and a commuters' association (plaintiff-intervenors), from a final judgment and decree dated December 4, 1958 of a three-judge District Court. Said decree (one judge dissenting) dismissed this action which had been brought in the District of New Jersey to bar discontinuance by the Railroad, pursuant to recently enacted Section 13a.(1) of the Interstate Commerce Act, of operation of its losing trans-Hudson ferries.

(a) **The Railroad's prior Section 1(18) application in respect of its interstate ferries.** The Railroad's prior application under Section 1(18) of the Interstate Commerce Act is an important part of the background of the present case and is discussed in both jurisdictional statements and in the opinions below.

Since 1954, the Railroad has been seeking to terminate the operation of its trans-Hudson ferry lines because, on an out-of-pocket basis, they were and are losing about $1,200,000 a year. After extensive hearings and briefs before an Examiner of the Interstate Commerce Commission and further briefs and oral argument before Division 4, the Commission in

September 1956, pursuant to Sections 1(18)-(20) of the Interstate Commerce Act, granted to the Railroad a Certificate of Public Convenience and Necessity which permitted abandonment of these ferry lines. In granting the Certificate, Division 4, among other things, found (295 I. C. C. at p. 405) "that reasonably adequate and convenient substitute service is available for those who now travel to Manhattan via Weehawken".* The Division 4 opinion said further (295 I. C. C. at p. 411): "We find that the railroad-ferry service has become outmoded and unnecessary as a direct consequence of a preponderant portion of the public who once relied upon the applicant's service having adapted their riding habits to the use of alternative modes of transportation."** After another round of briefs and oral argument, the full Commission affirmed the Division 4 decision (295 I. C. C. 519, May 1957).

The parties who are appellants here having brought an action to set aside the order of the Commission, the District Court in December 1957 ruled that, since freight service of the Railroad would continue by other facilities and routes across the Hudson River between Weehawken and New York City after cessa-

* The substitute service referred to, so far as the 3,000 present rail-ferry passengers are concerned, is from their home stations and does not cover merely the ferry ride from Weehawken to New York City. As to the remaining 1,300 present ferry passengers who arrive at the Weehawken ferry terminal by bus or car rather than by rail, the substitute service referred to would involve their taking the bus or car to another of a number of connections for New York City. The appellants' repeated efforts to emphasize the fact that no ferries other than those of the Railroad operate between its termini at Weehawken and New York City is pointless; by so restricting their vision solely to the routes between these termini, the appellants lose sight of the reality that the substitute service which the Commission found to exist lies elsewhere.

** Since the date of the above opinion, the number of users of the Railroad's ferries has continued to decline steadily.

tion of operation of the Railroad's two passenger ferry lines, such cessation of operation of the ferry lines would constitute only a partial discontinuance of service and not an abandonment of a line. Therefore, because the Commission has jurisdiction under Sections 1(18)-(20) only to authorize a railroad to "abandon all or any portion of a line", the District Court set aside the Commission's order as beyond its jurisdiction. The Railroad appealed that decision to this Court (No. 41, Oct. Term, 1958) which noted probable jurisdiction (357 U. S. 917).*

Because relief to the Railroad under Section 1(18) may be impossible and at least is likely to be long delayed, the Railroad has since sought to avail itself of the much faster alternative remedy recently made available to it by the enactment in August 1958 of new Section 13a.(1) of the Interstate Commerce Act. The present appeals concern that new Section.

(b) **Legislative history of Section 13a.(1).** The legislative history of the Transportation Act of 1958 (passed as stated therein "to strengthen and improve

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* If the District Court had in the Section 1(18) case passed upon the merits, both the jurisdictional issue and the evidentiary issue could have been disposed of by this Court in one ensuing appeal without undue delay. However, the District Court, because of its jurisdictional decision, refused (158 F. Supp., at pp. 103-4) to decide the merits (although saying that it had serious doubts as to the sufficiency of the evidence). Thereby the District Court postponed indefinitely the possibility of any relief to the Railroad under Section 1(18); for, if this Court should thereafter reverse the District Court solely on the jurisdictional issue, further proceedings on the merits would be necessary in the District Court (and perhaps before the Commission also, since the appellants are already claiming that the voluminous Commission record has become stale because of the very delays created by their own litigation), with the likelihood of a second appeal to this Court after the District Court decision on the evidentiary issue.

Of course, granting of the present motion to affirm would make the Section 1(18) appeal moot.

the national transportation system") demonstrates that Section 13a.(1) (added to the Interstate Commerce Act thereby) was designed by Congress as a means of meeting the critical emergency which it found to exist in the railroad industry. Congress having found that the railroads—and particularly the Eastern railroads which have a relatively large proportion of passenger business—were sliding toward bankruptcy, it concluded that, in the national interest, means must be devised to check the impending catastrophe before it was too late.*

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* The following is an excerpt from the Senate Subcommittee Report dated April 30, 1958, as adopted by the full Senate Committee on Interstate and Foreign Commerce (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958)):

> "A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce." (p. 21)

Two short excerpts from the Report dated June 18, 1958, of the House Committee on Interstate and Foreign Commerce (H. R. Rep. No. 1922, 85th Cong., 2d Sess. (1958)) follow:

> "• • • The overall passenger deficit is estimated by the Interstate Commerce Commission as now amounting to $700 million annually. For the railroads to show any net income at all, accordingly, revenues from freight must be sufficient to offset such losses. With decline in freight traffic, the difficulty of making such offsets is accentuated, • • • (p. 8)
>
> "The committee is fully conscious of its responsibilities in the transportation field, and the need for the maintenance of a sound common carrier transportation system adequate for the demands of our economy and the requirements of our national defense. The committee is convinced, from the hearings and studies it has conducted for some time now that something must be done, and now must be done quickly, in the legislative field, if our common carrier transportation system is to be preserved in a position where it can continue to meet what is required of it." (p. 9)

After months of hearings, full debate on exhaustive committee reports and action by a conference committee, the Transportation Act of 1958 was passed by a vote of 348 to 2 in the House and by a voice vote in the Senate.

It is not too much to say that Congress had in mind these ferry operations as an example of the passenger services which it expected to be discontinued under the summary provisions of Section 13a.(1).* If Congress had constitutional power to legislate as it did, that intention must be given effect; and we think it unquestionable, as will be developed later herein, that Congress had such power.

(c) **Application of Section 13a.(1) to this case.** A copy of Section 13a. is annexed hereto as Appendix I. Section 13a.(1) provides that if a carrier's rights with respect to discontinuance or change of operation of any interstate train or ferry are subject to an order of "any court or an administrative or regulatory agency of any State" then, upon following the prescribed procedure and in the absence of interposition by the Interstate Commerce Commission, the discontinuance or change may take place notwithstanding such State order. The record shows that the New Jersey regulatory board has entered an order requiring continuance of operation of these interstate fer-

* Note the use of the word "ferry" in Section 13a.(1). The Hudson River ferries were the only ferries which were in issue in 1958 in the hearings before the Congressional Subcommittees. In earlier provisions of the Interstate Commerce Act, "railroad" lines and not "ferries" were specified; and railroad "ferries" were covered by such "railroad" provisions only because of the general definition in Section 1(3)(a) which included "ferries" in the term "railroad" for the purposes of the Act. But Congress had these Hudson River ferries so much in mind when it enacted Section 13a.(1) that it used the specific term "ferry" therein.

ries, and that a New Jersey Court has entered an order enforcing the board's order. Such attempted regulation by the State of these interstate ferries fits squarely within the provisions of Section 13a.(1).

Promptly after enactment of the Transportation Act of 1958, the Railroad on August 13, 1958 filed, served and posted the notice required by Section 13a.(1) of a proposed discontinuance of its trans-Hudson ferry operations on September 13, 1958. On August 26, 1958 the Commission issued a notice that it had concluded not to require the ferry service to be continued and it reiterated that conclusion in an order dated September 2, 1958.

The appellants (which had filed complaints with the Commission) thereupon brought this action. After a hearing on November 3, 1958, the District Court later in November 1958 handed down opinions in which a majority of the Court sustained the constitutionality of Section 13a.(1) and directed that the complaints of the plaintiffs and of the plaintiff-intervenors be dismissed. The District Court entered its decree on December 4, 1958 (one judge dissenting) and at the same time (a different judge dissenting) stayed, without bond, the effectiveness of its decree pending appeal to this Court from the final decree. Accordingly, while this appeal is pending, the Railroad continues to lose over $1,200,000 a year as a result of these continued ferry operations.*

* Section 13a.(1) provides that the Commission must act within 20 days to require continuance of a train or ferry by a preliminary order and also that, if the Commission does so act, its preliminary order cannot be effective for more than four months. Both these time limitations have expired; but the Railroad is nevertheless still being required to continue operation of its losing interstate ferries contrary to the will of Congress so clearly expressed in Section 13a.(1).

ARGUMENT

The complaints were framed on two theories, first, that the appellants were attacking the constitutionality of the provisions of Section 13a.(1) which are here involved, and, secondly, that they were seeking to review an order of the Interstate Commerce Commission.

We contend (a) that the meaning and intent of Section 13a.(1) plainly are that the Interstate Commerce Commission is to have unreviewable discretion whether to interpose pursuant to that statute to investigate a proposed discontinuance of interstate train or ferry operations, (b) that, so construed, Section 13a.(1) presents no constitutional difficulties whatever, (c) that the appellants clearly have no standing to challenge the constitutionality of the statute, and (d) that the grounds on which the minority opinion rests are on their face unsound.

(a) **The meaning and intent of Section 13a.(1) plainly are that the Interstate Commerce Commission is to have unreviewable discretion whether to interpose thereunder.** The legislative history summarized above shows that a prime purpose of Congress, in enacting this emergency legislation, was to afford the railroads the prompt relief from deficit interstate operations which they need in order to continue to exist under private ownership. Accordingly, the language and framework of Section 13a.(1) make clear the Congressional intent that a conclusion of the Commission, in its discretion, not to assert in a particular case the limited veto power granted to it by that Section was to be final and unreviewable.

Section 13a.(1) provides that the Commission shall neither prevent a proposed discontinuance nor order restoration unless the Commission enters upon an investigation thereof within the initial 30-day period. Only if the Commission enters upon an investigation within that limited period does Section 13a.(1) require a hearing and findings, and then only as a necessary basis for the Commission's ordering continuance or restoration of the service. The intentional contrast between the Section 13a.(1) situations where hearings and findings are required and those where they are not is plain from the statute.*

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* The State's jurisdictional statement relies on the provision of Section 13a.(1) which authorizes the Commission to enter upon an investigation within 30 days and thereafter to hold hearings in connection therewith. The State (*e.g.*, p. 28) seeks to torture this *authorization* into a statutory *requirement* that the Commission hold hearings in all cases. But the lack of merit in the State's contention is demonstrated by the statute itself. The preceding sentences of Section 13a.(1) make it clear beyond question that the provision for an investigation is permissive and not mandatory—for the statute provides explicitly that the carrier may effect the discontinuance within 30 days unless otherwise ordered by the Commission. The State (p. 25) itself concedes that Section 13a.(1) "may be literally read as permissive and as vesting the Commission with discretion to deny a hearing". The intervenors make a similar concession when they say (p. 24): "The statute does not require the Commission in deciding not to institute an investigation to base its decision upon substantial evidence in the record before it, nor does it require the Commission to make any basic findings of fact to support its decision".

The State also puts its contention in another way—it asserts (p. 14) that Section 13a.(1) is subject to the same hearing requirements as Section 1(18). In this manner, notwithstanding the entirely different terms of the two statutes, the State seeks to import into Section 13a.(1) the interminable delays which have prevented the Railroad's Section 1(18) ferry proceeding, commenced in 1954, from coming to fruition. It was to prevent such delays that Congress enacted Section 13a.(1) with its greatly restricted time limits; by its contention the State is seeking to frustrate the clear will of Congress.

No possible construction of the statutory provisions can find in them any intention that, within the 30-day time limit imposed by Congress, the Commission must hold hearings and make findings to support its conclusion not to enter upon an investigation or that, within the same limited period, the Courts are authorized to review a conclusion by the Commission that it should not enter upon an investigation. Certainly, no hearings (with attendant findings and subsequent Court review) could possibly be completed in 30 days (or even 10 times 30 days in a bitterly contested proceeding like the present one). And the contention of the appellants that there can be no summary action by the Commission as provided in the statute and that the Commission must hold hearings in all cases seeks to strike from the statute an entire and vital portion.*

That Section 13a.(1) was intended to permit summary action by the Commission without hearings or Court review is confirmed by express statements on the Senate floor (*e. g.*, 104 Cong. Rec. 9762, 9749-50 (Daily Ed. June 11, 1958)). This is also conceded in the plaintiffs' complaint which bases its contention of unconstitutionality on the failure of Section 13a.(1) to require, as a basis for concluding not to interpose, a "public hearing, findings of fact, or

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* Both the jurisdictional statements (State, p. 3; intervenors pp. 16-18) make the additional contention that Section 10 of the Administrative Procedure Act (5 U. S. C. § 1009) provides for review by the Courts of the Commission's refusal to interpose. Section 10 contains its own refutation of this contention. It specifically excepts from judicial review those cases where Congress has intended to preclude such review or to confide the matter to agency discretion (*Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309, 317 (1958)).

any other reasonable safeguard against arbitrary action". Accordingly, no construction of Section 13a.(1) to require hearings and Court review in respect of Commission failure to interpose thereunder is at all possible.* If the plaintiffs have no sound constitutional objection to these explicit statutory provisions, there can be no basis for their appeal.

(b) **Section 13a.(1) presents no constitutional difficulties.** No challenge has been, or can be, made to the power of Congress to supersede State regulation of interstate commerce.** The Congressional power over interstate commerce is complete and plenary and

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* While the statute makes the Commission's refusal to investigate unreviewable, it is of interest that the majority opinion in the District Court expressly found "no suggestion in the present record that the Commission acted arbitrarily or capriciously in deciding not to investigate the proposed ferry discontinuance" and that the dissenting opinion contains no statement to the contrary. In view of the extended Commission hearings and reports in the Section 1(18) and the more recent rate proceedings relating to the ferries, and in view of the series of prior cases going back to *Central R. R. of N. J. Trustees Ferry Abandonment*, 249 I. C. C. 269 (1941), in which the Commission has authorized abandonment of trans-Hudson ferry lines of other railroads, one can hardly imagine a Section 13a.(1) case where the Commission would have more extensive information about the subject-matter than was available to it with respect to these ferries. Also, in connection with operations of interstate railroads generally, it is part of the Commission's duties under the Act to keep currently informed as to such operations and it regularly receives reports from the New York Central and the other railroads as to their operations.

** The State's jurisdictional statement says (p. 14) that "The State and Board do not challenge the right of Congress to regulate in the instant case and to provide for a definitive national transportation policy;" and says further (p. 15) that "New Jersey is not asserting that Congress has invalidly taken away its historic right to regulate ferry service across the Hudson River by the Transportation Act of 1958". However, the State's attempted

cannot be limited or restricted by the action of any State.

Gibbons v. *Ogden*, 9 Wheat. (22 U. S.) 1, 196-7 (1824);
The Minnesota Rate Cases, 230 U. S. 352, 398 (1913);
New York v. *United States*, 257 U. S. 591, 600-1 (1922);
Colorado v. *United States*, 271 U. S. 153, 165 (1926);
Chicago v. *Atchison, Topeka & Santa F. R. R.*, 357 U. S. 77, 87-8 (1958).

And the intervenors' jurisdictional statement concedes that Congress intended by Section 13a.(1) to exercise its paramount power for it states (p. 22): "There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to preempt the field, thereby ousting state jurisdiction".

However, both jurisdictional statements claim that failure of Section 13a.(1) to require the Commission to hold hearings before concluding not to interpose violates the Fifth Amendment.

We should first point out that the proposed discontinuance of the ferry service is based on authorization received by the Railroad from Congress—not from the Commission. Under Section 13a.(1), the

challenge of the validity of Section 13a.(1) as written runs counter to these concessions.

Despite the above-quoted concessions, both the jurisdictional statement of the State (p. 20) and that of the intervenors (p. 7) rely also, in connection with their constitutional claim, on their assertions that the Railroad operates its ferries under State franchises. But it has been expressly held by this Court that this presents no obstacle to exercise of the federal paramount power over interstate commerce (*Colorado* v. *United States*, 271 U. S. 153, 165 (1926)).

Commission has no power to authorize a discontinuance; all it can do is to interpose a veto, and then only a temporary one. Where, as here, the Commission has in its discretion concluded not to exercise its limited veto power, the Commission is no longer involved in any way and the Railroad, in effecting the discontinuance, is thereupon acting under direct authorization embodied in the legislation passed by Congress.* Other legislation enacted by Congress for the purpose of removing a burden on interstate commerce has been upheld by this Court in the face of Fifth Amendment objections.

New York v. *United States,* 257 U. S. 591, 601 (1922);

Louisville & Nashville R. R. v. *Mottley,* 219 U. S. 467, 482 (1911);

Union Bridge Co. v. *United States,* 204 U. S. 364, 400 (1907).

A relatively recent and controlling decision on this due process point is *American Trucking Assns.* v. *United States,* 344 U. S. 298, 322-3 (1953).

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* This is succinctly stated in the opinion of the Court below (Appendix A, State's jurisdictional statement, p. 38) as follows:

"Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not it, upon receipt of a complaint directed against a railroad's notice of intention to discontinue service, shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act. The Act is self-implementing insofar as it affords authorization to a carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission."

It is also impossible to see any basis for assertion by a State of a due process objection under the federal Constitution to duly enacted federal legislation concededly intended to withdraw from the State the power to regulate a particular area of interstate commerce.

Moreover, even in those cases where action by an administrative agency is specifically required by the statute involved, the Fifth Amendment does not, as the appellants contend, require that there be in all cases hearings, findings and Court review. In numerous cases where the Courts have found Congress to have intended by statute to authorize an agency to take discretionary action thereunder—action which was to be final and unreviewable—the grant of such absolute discretion to the agency has been upheld.

For example, this Court recently held in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309 (1958), that Congress had vested in a government agency absolute discretion to fix tolls for use of the Panama Canal and that the Courts could not review its refusal to initiate a proceeding for readjustment of the tolls as sought by users of the Canal.*

* The Court said (pp. 317-8):

"Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.' We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co. * * * These are matters on which experts may disagree; they involve nice issues of judgment and choice. *New York* v. *United States*, 331 U. S. 284, 335, which require the exercise of informed discretion. * * * Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake

Similarly, refusal of the National Labor Relations Board or its general counsel to institute complaint proceedings under the National Labor Relations Act is not subject to review by the Courts, even though such refusal leaves the complainant without remedy.

Labor Board v. *I. & M. Electric Co.*, 318 U. S. 9, 18 (1943);

Amalgamated Workers v. *Edison Co.*, 309 U. S. 261, 268-9 (1940);

National Labor Relations Board v. *Lewis*, 249 F. 2d 832, 838 (9th Cir. 1957), *aff'd*, 357 U. S. 10 (1958);

Manhattan Const. Co. v. *National Labor Relations Bd.*, 198 F. 2d 320 (10th Cir. 1952);

Lincourt v. *National Labor Relations Board*, 170 F. 2d 306 (1st Cir. 1948);

Jacobsen v. *National Labor Relations Board*, 120 F. 2d 96, 100 (3d Cir. 1941).

Likewise, the Courts have no power to direct the Securities and Exchange Commission to enter upon an investigation under the Securities Act of 1933 (*Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944, 948-9 (1st Cir. 1947); *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (D. C. Cir. 1955), *cert. denied*, 350 U. S. 825 (1955).

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of law, then judicial relief is often available. • • • But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *Kadrie*, 281 U. S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 62-63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision."

An analogous situation is involved in the line of cases holding that, under Section 15(7) of the Interstate Commerce Act, the Commission's refusal to suspend the effectiveness of newly filed tariff rates is not reviewable.

> *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 429 (1930);
> *Carlsen* v. *United States*, 107 F. Supp. 398 (three-judge Court S. D. N. Y. 1952);
> *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495 (three-judge Court E. D. Va. 1935).*

National Mediation Board certification pursuant to the Railway Labor Act of a particular union as bargaining agent has also been held final and not subject to review.

> *Switchmen's Union* v. *Board*, 320 U. S. 297, 303-4 (1943);
> *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320

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* The State (pp. 22-6) tries to use Section 15(7) to support its argument that Section 13a.(1) should be construed to require hearings in all cases. Not only would such construction be squarely contrary to the terms of Section 13a.(1), but Section 15(7) lends no assistance to the State's argument. There is no requirement under Section 15(7) that the Commission hold hearings whenever any new rate is filed; on the contrary, under Section 15(7) the Commission has absolute discretion not to take any action whatever in respect of a newly filed rate, and the shipper can then challenge the reasonableness of such rate only by invoking other Sections of the Act. Accordingly, under Section 15(7), the Commission has the same absolute discretion to refuse to interpose as it has under Section 13a.(1).

U. S. 715 (1943), *reversing* 137 F. 2d 817 (D. C. Cir. 1943).*

In connection with their due process contention, the appellants cite various cases which are simply not in point. The largest group of such inapplicable cases relied on by appellants (*e. g., Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88 (1913)) consists of those where Congress has required a hearing as a basis for administrative action and a hearing has not been accorded or has not been properly conducted. Where the right to a hearing is given by statute, these cases cited by appellants hold that there must, of course, be a fair hearing. But, in the present case, Congress did not provide for a Commission hearing as a prelude to its concluding whether to investigate and hold hearings—it obviously intended that the Commission's conclusion whether to interpose should be reached without a

* Similar holdings that administrative action was final and unreviewable have been made with respect to whether a taxpayer is entitled to a special assessment under the Revenue Act of 1918 (*Williamsport Co.* v. *United States*, 277 U. S. 551 (1928)); with respect to Interstate Commerce Commission certificates as to amounts owing by the United States to the railroads (*Great Northern Ry.* v. *United States*, 277 U. S. 172, 182 (1928); *Butte, A. & P. Ry.* v. *U. S.*, 290 U. S. 127, 142 (1933)); with respect to refusal of State officials to take action in reference to claimed insanity of persons condemned to execution (*Solesbee* v. *Balkcom*, 339 U. S. 9, 13 (1950); *Caritativo* v. *California*, 357 U. S. 549 (1958)); with respect to a determination by the President under the flexible tariff provisions of the Tariff Act of 1930 (*United States* v. *Bush & Co.*, 310 U. S. 371, 380 (1940)); and with respect to determination of the Foreign Claims Settlement Commission concerning distribution to American citizens of funds received from Yugoslavia (*De Vegvar* v. *Gilliland*, 228 F. 2d 640 (D. C. Cir. 1955) *cert. denied*, 350 U. S. 994 (1956); *American and European Agencies, Inc.* v. *Gilliland*, 247 F. 2d 95 (D. C. Cir. 1957) *cert. denied*, 355 U. S. 884 (1957)).

hearing. Therefore, the cases on how hearings must be conducted in situations where hearings are required by statute are not relevant here where Congress clearly intended otherwise and there is no sound constitutional objection to effectuation of the Congressional intent.

Another inapplicable type of case (*e. g., Harmon* v. *Brucker*, 355 U. S. 579 (1958)) is one where a commission has proceeded in violation of the letter of the statute involved or has exceeded its authority thereunder. Such a case where a commission has disobeyed a statutory mandate or has ignored a statutory limitation is of course entirely different from the present case where the Commission has acted strictly in accordance with the terms of the relevant statute.

The intervenors (but not the State or its regulatory board) also argue (pp. 23-5) that Section 13a.(1) constitutes an invalid delegation of legislative power and in this connection cite *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935) and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). Leaving aside the question whether these two cases have been overruled by subsequent holdings (see *Bowles* v. *Willingham*, 321 U. S. 503, 540 (1944); *United States* v. *Sharpnack*, 355 U. S. 286 (1958)), the cases have no bearing here. The preamble to the Interstate Commerce Act contains the general policy pursuant to which, as expressly stated therein, all provisions of the Act are to be administered and this is clearly a sufficient standard for the guidance of the Commission. As this Court said in *McLean Trucking Co.* v.

United States, 321 U. S. 67, 82 (1944), such general policy

> "is the Commission's guide to 'the public interest,' *cf. New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Texas* v. *United States,* 292 U. S. 522, * * *".*

Another argument made by the intervenors (pp. 29-31), but not by the State, is that the appellants were entitled to a trial *de novo* of their constitutional question in the District Court. The principal case upon which the intervenors rely is *Crowell* v. *Benson,* 285 U. S. 22 (1932). Davis, Administrative Law 918 (1951), states that the constitutional fact doctrine of that case is virtually dead, although not explicitly overruled. Also, the intervenors wholly misconceive the nature of the doctrine for otherwise they would not claim that it is applicable here. Under that doctrine, the Courts may retry constitutional facts without regard to the prior trial and determination thereof by the administrative agency. But the constitutional fact contention made here by the intervenors simply begs the question because it assumes that there are constitutional fact issues involved in this case which must be adjudicated by the Commis-

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* Various other provisions of the Act have repeatedly been upheld even though they set forth no specific standards (*e. g.,* § 4(1), the long and short haul clause, *Intermountain Rate Cases,* 234 U. S. 476, 486-9 (1914); and § 15(7) authorizing suspension by the Commission of proposed tariffs, *Carlsen* v. *United States,* 107 F. Supp. 398 (three-judge Court S. D. N. Y. 1952)). This Court has repeatedly sustained general standards like "public interest" (*United States* v. *Chemical Foundation,* 272 U. S. 1, 12-13 (1926)), or "inferior" quality *Buttfield* v. *Stranahan,* 192 U. S. 470, 496-7 (1904), or "fair and equitable" *Yakus* v. *United States,* 321 U. S. 414, 423-6 (1944), or "excessive profits" *Lichter* v. *United States,* 334 U. S. 742, 783-6 (1948).

sion and then may be retried by the Courts, and that is not the case. Once it is determined that Section 13a.(1) is constitutionally valid notwithstanding that it authorizes the Commission, without hearings or the adjudication of any facts, to refuse to interpose, there is no issue of fact to which the constitutional fact doctrine could possibly apply.

Another strange contention made by the intervenors (pp. 27-8), but not by the State, is that, comparing Section 13a.(1) with Section 13a.(2), the former is discriminatory. Their argument rests on the fact that Section 13a.(2), applying to operations solely within a State, provides that State jurisdiction shall be superseded only after hearings, while Section 13a.(1), involving solely operations from one State to another, does not require hearings unless the Commission orders them. However, there is no "equal protection of the laws" clause in the Fifth Amendment such as exists in the Fourteenth Amendment. Moreover, a contention that Congress may not constitutionally adopt one procedure for interstate operations and another procedure for intrastate operations is palpably without substance.

(*c*) **The appellants clearly have no standing to challenge the constitutionality of Section 13a.(1).** It is well settled that the public appellants (the State of New Jersey, its regulatory board and the local communities) may not on behalf of the citizens of the State attack the constitutionality of federal legislation.

Massachusetts v. *Mellon*, 262 U. S. 447, 485 (1923);
Florida v. *Mellon*, 273 U. S. 12, 18 (1927);

Georgia v. *Pennsylvania R. R.*, 324 U. S. 439, 446 (1945).*

Turning now to the users of the rail-ferry service, they are not entitled to attack the constitutionality of a federal statute unless they can show that they have a substantive legally protected interest; otherwise, such harm as they may suffer is *damnum absque injuria*. *Tileston* v. *Ullman*, 318 U. S. 44, 45-6 (1943); see *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700-701 (2d Cir. 1943): *cf. American Trucking Assns.* v. *United States*, 344 U. S. 298, 322-3 (1953).

But the users of the ferry service have no such legally protected interest as to entitle them to maintain an action to invalidate Section 13a.(1) and compel continuance of the losing ferry operations. They obviously have no legal right to insist that Congress shall not, in the exercise of the commerce power, restore the interstate railroads to an unregulated status, either in whole or in part. It is the function of Congress to decide such a policy question directly affecting interstate commerce and the ferry users may not appeal the question from Congress to the Courts. Their use of the deficit ferry service and their desire to have it continue is not a property interest protected by the Fifth Amendment, as is demonstrated

* Similar holdings are *Smith* v. *Indiana*, 191 U. S. 138, 149 (1903), where a State officer was held to have no standing to raise federal constitutional questions and *Jersey City* v. *United States*, 101 F. Supp. 702 (three-judge Court D. N. J. 1950), where the City of Jersey City was held to be without standing to challenge a Commission order granting an increase of railroad fares.

by holdings involving other users of rail service and persons in analogous positions.*

(d) **The grounds on which the minority opinion rests are on their face unsound.** The first ground of the dissent is that the general complaint provisions of the Interstate Commerce Act (Sections 13(1) and 13(2)) apply to Section 13a.(1) and require the Commission to hold hearings in all Section 13a.(1) cases, notwithstanding the contrary intention demonstrated in Section 13a.(1) itself. But, as already set forth herein, to require a hearing under Sections 13(1) and 13(2) or otherwise as a basis for the Commission's concluding not to interpose would emasculate Section 13a.(1). Section 13a.(1) is complete on its face and is therefore in no way affected by Sections 13(1) and 13(2). What the dissent seems to be saying in substance is that Section 13a.(1), in not requiring a hearing in all cases where complaints are filed thereunder, is inconsistent with Sections 13(1) and 13(2). However, Section 13a.(1) is much the later statute and it would control if there were any inconsistency between the two statutes and would repeal the earlier statute to the extent of the inconsistency.

Moreover, there is no inconsistency between the later and earlier statutes. Sections 13(1) and 13(2) apply only to complaints against a carrier for action done or omitted "in contravention of the provisions"

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* *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125, 129 (1940); *City of Atlanta* v. *Ickes*, 308 U. S. 517 (1939), *affirming* 26 F. Supp. 606 (three-judge Court D. D. C. 1939); *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 136-40 (1939); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478-81 (1938); *Sprunt & Son* v. *United States*, 281 U. S. 249, 255 (1930); *Johnson* v. *Chesapeake & O. Ry.*, 188 F. 2d 458 (4th Cir. 1951) *cert. denied*, 342 U. S. 833 (1951); *Woodruff* v. *United States*, 40 F. Supp. 949 (three-judge Court D. Conn. 1941).

of the Act. No one has pointed to any provision of the Act which would be violated by the Railroad's discontinuance of these ferries.* Certainly, action which a carrier proposes to take in exact accordance with the provisions of Section 13a.(1) cannot possibly *contravene* any provision of the Act.

The second ground of the dissent (and the leading argument made by the intervenors in this Court) is that the notice filed under Section 13a.(1) was defective because it gave notice of discontinuance of "all" the Railroad's trans-Hudson ferries. The statute states that the operation, in whole or in part, of "any" train or ferry in interstate commerce is subject thereto; and the dissent (and the intervenors) contend that under this provision of the statute there should have been five separate notices (one for each of the five ferries which the Railroad is operating) instead of a single notice covering the operation of all five ferries. Why the statute should be so construed is not apparent. The object of a notice is to convey information, and obviously more information was conveyed by referring to discontinuance of "all" the ferries than by referring to each of five different ferries by name or number and thereby leave it open to question whether these were "all" the ferries. Moreover, a complete answer to the contention is the fact that the statutory Rules of Construction (1 U.S.C. § 1) provide in substance that, in construing a federal statute (unless the context indicates other-

* The appellants themselves obtained the prior District Court decision that neither the abandonment provisions of the Interstate Commerce Act (Sections 1(18)-(20)) nor any other provisions of the Act cover discontinuance of the Railroad's interstate ferry service.

wise), words importing the singular shall include the plural and words importing the plural shall include the singular. The majority did not consider this point worthy of mention in its opinion and the State and its regulatory body do not even refer to it.

Finally, under the heading "Is Section 13a(1) unconstitutional?", the dissent does not set forth any reason why the statute is invalid, but argues only that Section 13a.(1) is unjust. The dissent says "that the public was ignored in the formulation of the amendment 13a(1)" and that the dissenter has "therefore grave misgivings about the justice of the statute for the Fifth Amendment also protects states and their subdivisions and their citizens". The dissent thereby takes the view that local interests should in justice take priority over the national public interest as determined by Congress. However, in thus inveighing against the wisdom of Section 13a.(1), the dissent presents no constitutional question. Plainly, the wisdom of Section 13a.(1) is, under our Constitution, a matter for Congress and not for the Courts.* There is no substance to the theory of the dissenting opinion that litigants who are displeased with federal legislation may resort to the federal Courts for review

* Nor do the intervenors present any question appropriate for this Court when, in the following statement, they ask it carefully to scrutinize the action of Congress in enacting Section 13a.(1 (p. 22):

> "There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to pre-empt the field thereby ousting state jurisdiction. However, it is submitted that in such a situation the action of Congress must be carefully scrutinized."

of the wisdom of Congress in enacting statutes which are within the limits of its constitutional power.*

Conclusion

No substantial question either of constitutionality or statutory construction is presented by these appeals and the judgment below should therefore be affirmed.

Alternative Motion to Advance

If the Court does not grant this motion to affirm, the Railroad respectfully requests that the Court accelerate the progress of these appeals so that they may be heard and decided during this term. The District Court on December 4, 1958, in granting a stay without bond, required that the notice of appeal, record and jurisdictional statement be filed in this Court by January 2, 1959; and, in arguing below for the stay, counsel for the intervenors said to the District Court that they "would not let a day go by that we [they] could help in trying to get this matter before the Supreme Court."

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* The writer of the dissenting opinion below was the author of the opinion rendered by the District Court in the Section 1(18) case and in that opinion he recognized that Congress could "in its wisdom" grant the requisite authority, saying (158 F. Supp., at p. 103):

> "The Congress may in its wisdom decide to grant the requisite authority, though as yet there is no intimation of this from the legislative history, but until that time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service."

Thereafter, and exactly in accord with such statement, Congress by Section 13a.(1) supplied directly to the Railroad the authority which the dissenter found to be missing in the earlier case.

This alternative relief is sought so that the Railroad may as soon as possible be relieved of the burden of its out-of-pocket ferry losses which continue at the rate of over $1,200,000 per annum; early relief from losses like these was the plain intention of Congress when it enacted the emergency provisions of Section 13a.(1).

Respectfully submitted,

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Dated: January 12, 1959.

APPENDIX I

Section 5 of the Transportation Act of 1958 (P. L. 85–625)

"Sec. 5. The Interstate Commerce Act, as amended, is amended by inserting after section 13 thereof a new section 13a as follows:

'DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

'Sec. 13a. (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision

or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such

discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

'(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service or such train or ferry without discontinuance or change, in whole or in part,

will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.' "